BEUC The European Consumer Organisation

The Consumer Voice in Europe

EUROPEAN COMMISSION CONSULTATION ON SUSTAINABILITY AGREEMENTS IN AGRICULTURE

BEUC's comments on the draft Guidelines on the Antitrust Derogation in Article 210a CMO

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Why it matters to consumers

The need for more sustainable markets has become a critical issue in our economies and societies. Consumers are increasingly concerned about the impact their consumption has on the environment and on communities across the world. Given that the agricultural sector is a vital part of the European economy and its evident impact on the environment, a more sustainable agri-food supply chain will play a key role in achieving the EU's environmental and climate goals. Initiatives promoting real and substantive sustainability gains are thus to be strongly welcomed.

However, the burden of this transition must not fall on consumers alone. The risk of harm to consumers by overburdening them with unjustified price increases and through greenwashing or hampering more far-reaching sustainability improvements should not be underestimated. Consumers must be able to make sustainable choices with confidence.

Summary

The draft Guidelines offer guidance on how to design sustainability agreements in the field of agriculture to benefit from the derogation from EU competition rules introduced in Article 210a of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products (CMO Regulation).

Article 210a provides for a derogation to the illegality of agreements restricting competition set out in Article 101 Treaty on the Functioning of the European Union (TFEU) insofar as such agreements concern higher sustainability standards.[1] While higher sustainability standards in food production are to be strongly supported, it is essential that such agreements do not lead to greenwashing and unacceptable restrictions of competition and thus to consumer harm.

This position paper sets out necessary amendments to the draft Guidelines, in particular:

1. Since Article 210a is a derogation from the general principle prohibiting anticompetitive agreements laid down in the TFEU itself, this exclusion must be interpreted narrowly.
2. Article 210a applies when agreements concern standards that are higher than legal standards. The suggestion in the draft Guidelines, that if there is no existing mandatory standard, a sustainability agreement that adopts a sustainability standard may still fall

[1] Pursuant to Article 210a(1) certain restrictive agreements that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law can be excluded from the general prohibition of Article 101(1) of TFEU. Article 210a covers sustainability agreements among several agricultural producers (horizontal agreements) or among one or more producers and one or more operators at different levels of the production, processing, and trade in the food supply chain (vertical agreements), including distribution through wholesalers and retailers. A sustainability standard for the purposes of Article 210a is defined in Article 210a(3) as a standard which aims to contribute to one or more of the following objectives: a) environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems; b) the production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that reduce the danger of antimicrobial resistance in agricultural production; and c) animal health and animal welfare.

under the exclusion is not appropriate. Such sustainability agreements could still be made in compliance with Article 101 TFEU but to interpret Article 210a in this way not only goes against the express wording of this Article but also risks such agreements precluding or delaying the adoption of higher binding sustainability standards and creating practical difficulties. More guidance should also be provided as to how much more beneficial the standard must be to qualify as "higher".

3. The Guidelines should ensure that the labelling of products complying with higher sustainability standards is clear for consumers and recognise the evident risk of greenwashing.
4. The Guidelines must allow innovation in sustainability to thrive, for which competition is an essential factor.
5. The indispensability requirement in Article 210a should be interpreted in the same way as under Article 101(3) TFEU. It must ensure that the benefits of the restrictions of competition contained in sustainability standards agreements outweigh the harms. Only agreements that are absolutely essential to achieve the higher sustainability standards should be permitted.
6. Caution is warranted in terms of allowing parties to sustainability agreements to continue benefiting from Article 210a even when they are not meeting the agreed sustainability standards on grounds of force majeure.
7. The draft Guidelines seem to promote a non-interventionist approach. However, in the event that agreements exclude competition or jeopardise Article 39(1)(e) the relevant competition authorities should immediately intervene to prevent prolonged harm to agricultural markets and consumers.
8. The Article 39 TFEU requirement to ensure that supplies reach consumers at reasonable prices must be considered in more detail in the Guidelines.
9. Where the Commission gives an opinion in line with Article 210a(6), or takes a decision under Article 210a(7), the draft Guidelines should explicitly foresee the involvement of third parties in the decision-making process.

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1. Introduction

BEUC welcomes the opportunity to comment on the European Commission's draft Guidelines on the derogation from competition law for certain types of sustainability agreements in the production of or trade in agricultural products introduced pursuant to Article 210a of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products (CMO).[2]

While initiatives to promote real and substantive sustainability gains are to be strongly welcomed, the interpretation of Article 210a should not open the door to greenwashing and undermining competition – the very driving force of innovation in sustainability – or to harming consumers by overburdening them with the transition costs to more sustainable agricultural practices and food supply chains.[3] A more vigilant approach should be ensured, all the more so in times of a cost-of-living crisis where businesses might use such initiatives as camouflage for increasing their profits, harming the most vulnerable consumers in our society by affecting their daily life needs.[4]

We welcome the fact that the draft Guidelines aim to provide more legal certainty in terms of the applicability of the derogation through examples of various scenarios. We also welcome the voluntary participation requirement and possibility to join an agreement at any point, as well as the draft Guidelines' commitment to ensure that producers are not used simply as an "excuse" to allow operators in between the "farm and fork" to inappropriately benefit from the derogation. This would be to the disadvantage of farmers, whose genuine involvement is stressed throughout in the text as crucial for the application of this article.[5]

Other parts of the Guidelines, however, require further clarification and a more appropriate interpretation of this new provision. The final version should embrace its very own starting point, that the Article 210a exception needs to be interpreted strictly.[6]

Though the Guidelines include various examples that are helpful and clarify the analysis of different types of agreements, the text is unclear on whether some agreements presented in the example boxes would overall be considered illegal or legal.[7] This is, however, essential to ensure an appropriate level of legal certainty, even more so where so much

[2] Sustainability agreements in agriculture – consultation on draft guidelines on antitrust exclusion, https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en

[3] EVP Vestager keynote speech at the Global Competition Law Conference: Competition policy for greater resilience and effective transition (under Antitrust for resilience and transition) of 20 April 2023: *"We want to enable these actions, but we want to draw a clear line around what constitutes greenwashing: the last thing Europe needs is cartels using sustainability as a cover for illegal collusion."*, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_2381. Similarly, EVP Vestager pointed out the need for competition authorities being *"mindful of companies shielding behind sustainability goals to lessen competition and call out the "green bluff"*, Antitrust, Regulation and the Political Economy conference in Brussels, March 2023.

[4] The Austrian competition authority launched in 2022 an inquiry into the food sector to examine rising prices, supply chains and inflation, https://www.bwb.gv.at/news/detail/bwb-praesentierte-aktualisierten-fairnesskatalog-und-startet-branchenuntersuchung-in-lebensmittelbranche. Similarly, the Hungarian competition authority announced at the beginning of 2023 that it will investigate whether competition law infringements or distortions of competition along the value chain may be contributing to the rising food prices, https://www.gvh.hu/en/press_room/press_releases/press-releases-2023/action-by-the-gvh-competition-authority-investigates-food-retail-chains. The Czech Competition Authority also started a sector inquiry into high food prices. See also https://www.theguardian.com/commentisfree/2023/mar/13/britain-cost-of-living-crisis-bosses-profits-shareholders-workers?CMP=Share_iOSApp_Other – which refers to profiteering by companies all along the agri-food supply chain as a result, at least in part, of lack of competition.

[5] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022. See for example paragraph 33 of the draft Guidelines Article 210a CMO.

[6] See paragraph 15 of the draft Guidelines Article 210a CMO.

[7] See for example paragraph 33 example 1, page 11; paragraph 61, example 3, page 17; paragraph 69, example 1, page 19.

emphasis has been placed on self-assessment. While the draft Guidelines list, in a non-exhaustive way, examples of agreements that (are likely to) restrict competition[8], they do not always make clear that assessing whether an agreement is restrictive of competition is only one aspect of the analysis. Whether such an agreement would be considered as legal or illegal overall still needs to be assessed.

While the Guidelines should assist producers and operators along the agri-food supply chain to adopt more sustainable practices, this cannot take place at the expense of end consumers. We therefore urge the Commission to review the excessively broad interpretation of the Article 210a exception in the draft Guidelines, given the harm that this risks causing to consumers.[9] It is recalled that, under Article 12 TFEU, *"consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities"*.

2. Legal context of the exclusion

2.1. Restrictive interpretation of Article 210a

While the draft Guidelines themselves refer to the settled case law[10] that requires a strict interpretation of exceptions to the competition law requirements set out in the TFEU, much of the draft Guidelines takes the opposite approach.[11] Throughout the draft Guidelines the Commission has outlined an interpretation that often favors the broadest interpretation of the provision and its wording. This is especially unfortunate, since a narrower interpretation of Article 210a would not put at risk the actual achievement of the sustainability goals of the provision but simply establish a balance between its proactive aims and the risks of long-term distortions of the competitive process and consumer harm.

A narrower interpretation of the scope of Article 210a would also not risk jeopardizing the achievement of the Common Agricultural Policy (CAP) objectives such that it does not touch upon the principle of the useful effect *("effet utile").* On the other hand, the suggested broad and extensive interpretation of the derogation put forward in the draft Guidelines does pose an unnecessary threat to the effectiveness of competition law rules designed to protect consumers.

By excluding certain types of sustainability agreements between producers of agricultural products and operators in the food supply chain from the prohibition on anticompetitive agreements in Article 101 TFEU, Article 210a represents a *lex specialis* to the general principle prohibiting anticompetitive agreements laid down in the TFEU. As for all exceptions to a general principle, this exclusion must be interpreted narrowly. It must be ensured that the effects of the derogation are not extended to situations which it is not intended to cover and that it is not extended further than is necessary for the protection of the interests which it is intended to safeguard.[12]

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[8] See annex E of the draft Guidelines Article 210a CMO. Examples are also provided throughout the text of the draft Guidelines.

[9] As noted by EVP Vestager: *"Consumers in a given market cannot be worse off"*, Antitrust, Regulation and the Political Economy conference in Brussels, March 2023. This is in line with EVP's speech at a Renew Webinar in September 2020 where she noted that *"[…] in any case, as competition enforcers, we also have our own task to carry out – to protect consumers, by defending competition. It's a task that's been given to us by the Treaties – and one that's essential to keep our economy working fairly for everyone, in the green future."*

[10] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 4; Judgment of 24 October 1995, Bayerische Motorenwerke, C-70/93, para. 28; Judgment of 30 April 1998, Cabour and Nord Distribution Automobile v Arnor "SOCO", C-230/96, para. 30; Judgment of 28 April 1998, Javico, C-306/96, para. 32; Judgment of 17 June 2010, Commission v France, C-492/08, para. 35; Judgment of 7 March 2017, Marine Harvest v Commission, Case T-704/14, para. 201.

[11] See paragraph 15 of the draft Guidelines Article 210a CMO.

[12] Judgment of 7 March 2017, Marine Harvest v Commission, Case T-704/14, para. 201.

This is all the more important given the absence of an impact assessment on the effects of the introduction of this derogation on the functioning of agricultural markets and potential harm to consumers.[13]

As the following examples will highlight, having regard to the above principles, a stricter interpretation of certain points is warranted in the Guidelines, without giving up the appropriate level of leeway and support provided by Article 210a to achieve much needed progress in the sustainability of the agri-food supply chain.

3. Material scope of Article 210a

3.1. Sustainability standards applied under Article 210a

3.1.1. The requirement that agreements on sustainability standards should be higher than standards mandated by Union or national law

For Article 210a to apply, the agreement must involve a sustainability standard that is higher than what is mandated by EU or national law. Nevertheless, according to the draft Guidelines, if there is no existing mandatory standard, a sustainability agreement that adopts a sustainability standard may still fall within the exclusion.[14]

The suggested interpretation to ignore the explicit requirement of the agreement involving a higher sustainability standard than an existing legal standard raises first, concerns of democratic legitimacy, second, practical difficulties and third, risks resulting in the adoption of lower sustainability standards than would otherwise be the case.

The Guidelines cannot override the wording of the derogation as adopted by the legislators to extend its scope. This does not mean, however, that agreements in the absence of such a mandated standard could never be entered into. They would simply need to comply with the requirements of Article 101 TFEU, with the possibility for market operators to benefit from the interpretation under the (updated) Vertical and Horizontal Guidelines on the applicability of Article 101.[15]

As regards the practicability of the provision as such, while the draft Guidelines note that sustainability standards should lead to tangible and measurable results, or where this is not appropriate, observable and describable results, the currently proposed interpretation in the draft Guidelines ultimately falls short of providing a reliable benchmark, also for enforcers.[16] Only when the legislator has sufficiently determined minimum standards, should companies be free from Article 101 TFEU to agree to exceed these standards under Article 210a. Without such a benchmark, companies could agree on insignificant sustainability improvements without scrutiny which could have harmful effects on consumers in terms of unjustified price increases or hindering innovation. The minimum legal standard represents the necessary common denominator between the public interest and the private beneficiaries of Article 210a.

The proposed interpretation of Article 210a could furthermore result in delays to laws that would otherwise ensure the introduction of genuinely and materially higher sustainability

[13] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 4. The absence of any detailed assessment of a significant derogation from Treaty provisions designed ultimately to protect consumers (Article 101 TFEU) is particularly noteworthy in light of the requirement in Article 12 TFEU to take consumer protection into account in defining and implementing other Union policies and activities, as noted above in the text.
[14] See paragraphs 53-58 of the draft Guidelines Article 210a CMO.
[15] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 6.
[16] See paragraphs 51, 52 of the draft Guidelines Article 210a CMO.

standards.[17] Having a mandatory minimum legal benchmark in place is necessary to ensure that industry-interest driven self-regulation does not take place in a legislative vacuum.

3.1.2. The meaning of standards higher than mandated by Union or national law

The draft Guidelines do not provide guidance on how much more beneficial the standard needs to be in order to be qualified as "higher" than a mandatory standard.[18] In this way, the draft Guidelines do not make clear that sustainability standards agreements must achieve a material improvement in standards for the objectives listed in Article 210a(3) and cannot be used as a means of greenwashing. Agreements among operators aiming at sustainability goals difficult to scientifically prove and measure should fall outside of the scope of Article 210a, with the possibility to benefit from exemption under Article 101(3) TFEU. Marginal contributions to the achievement of one of the Article 210a(3) objectives could normally not be deemed "necessary" (indispensable) as required under Article 210a(1).[19]

The Guidelines should spell out that the derogation must not allow producers and other players in the agri-food supply chain to game the system and sidestep the general principle of the prohibition of anticompetitive agreements. The sustainably standards they seek to adopt and apply should be meaningfully or materially higher than the legally mandated standard.[20] The Chicken of Tomorrow case is a good example of an agreement which would have led to a minimal improvement in animal health and welfare had it been allowed, when the market ultimately led to higher standards without this agreement.[21]

The draft Guidelines also propose that agreements exempted under Article 210a may relate to the implementation of a preexisting standard.[22] We urge the Commission to be cautious about such a broad interpretation. If such standards already operate successfully in the sense that they have achieved a noticeable market presence, an agreement to achieve them is by definition not indispensable under Article 210a CMO. An agreement to implement a pre-existing standard should thus not be considered indispensable where the only material novelty it aims to introduce is ultimately a higher degree of restriction of competition.

3.1.3. Compliance with agreed higher standards.

Agreements on higher sustainability standards must contain a mechanism to monitor and ensure that the standards are actually being adhered to in practice. Failure to do so would mean that the parties to the agreement would have little incentive to comply with the

[17] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 5. Our German member vzbv expressed concern that the 'Initiative Tierwohl' could delay the introduction of a more ambitious method of production labelling scheme developed by the German government.
[18] Paragraph 61 of the draft Guidelines Article 210a CMO. See also paragraph 88 of the draft Guidelines Article 210a CMO where it is simply stated that *"the more marginal the improvement of the sustainability standard that operators aim to attain (as compared to what is already mandated by EU or national law), the less likely it will be that operators would need to cooperate or that the restrictions chosen would need to be of a more serious nature or intensity"*. Clearer guidance is needed, especially since it is up to the operators to conduct self-assessment in terms of whether they fulfil the requirement(s) to benefit from the derogation or not. The final Guidelines should ensure consistency with the Horizontal Guidelines. See paragraph 608 of the draft proposed Horizontal Guidelines: *"When there is no data available allowing for a quantitative analysis of the benefits involved, it must be possible to foresee a clearly identifiable positive impact on [consumers], not a marginal one. The current experience with measuring and quantifying collective benefits remains scarce. The Commission will be able to provide further guidance on this matter after accumulating experience in dealing with concrete cases, which could allow the development of methodologies of assessment."*
[19] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 6.
[20] See also the requirement not to jeopardise the objective of Article 39(1)(e).
[21] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 5. Authority for Consumers and Markets, Welfare of today's chicken and that of the 'Chicken of Tomorrow, August 2020, https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow.
[22] See paragraph 46 of the draft Guidelines Article 210a CMO.

agreed standards. They could benefit from/free ride on potentially higher prices under an agreement whilst continuing to apply lower sustainability standards.

3.2. Labelling of sustainability standards

In addition to agreements needing to involve genuinely higher sustainability standards than those mandated by EU or national law, the final version of the Guidelines should state that it is essential that the labelling of such standards is clear for consumers, recognising thereby the risk of greenwashing – a risk evidently present in the economy (see more under section 4.2.1.). The need to have clear labelling of such standards has been identified by the Bundeskartellamt in its review of agreements in relation to animal welfare.[23] The Commission's recently published proposal for a Directive on green claims, also noted the importance of ensuring that consumers are provided with reliable, comparable and verifiable information.[24]

3.3. Harm to Innovation

Certain parts of the draft Guidelines could be harmful for innovation. For example, where the draft Guidelines refer to implementation measures in a sustainability agreement in order to attain the sustainability standard, they should clarify that a commitment to use a particular technology or production practice will be deemed acceptable only when it is genuinely necessary to attain the standard foreseen. To promote innovation, the parties to an agreement should generally be free to choose the best way to comply with the sustainability standard.[25]

4. Indispensability under Article 210a

4.1. The concept of indispensability

As Article 210a provides for a derogation to the normal rules on competition in Article 101, the concept of indispensability under Article 210a should be defined and understood in the sense of Article 101(3). The draft Guidelines introduce here a broader interpretation than is justified. A narrow interpretation is needed to ensure that only agreements (and the restrictions they contain) that are genuinely indispensable are exempted. Otherwise, consumers risk losing protection against unjustified higher prices and greenwashing without the possibility of gaining a substantial sustainability benefit in return.

Contrary to the draft Guidelines' contention[26], the mere fact that the derogation under Article 210a does not require that parties to an agreement ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement in question, as is

[23] The animal welfare initiative "Initiative Tierwohl" in Germany: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.pdf?__blob=publicationFile&v=3; BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 6.

[24] https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en. The proposal for a Directive on green claims of 22 March 2023 aims to contribute to ensuring that consumers have more clarity and better-quality information to choose environment-friendly products and services. This would also benefit businesses as those that make a genuine effort to improve the environmental sustainability of their products will be more easily recognised and rewarded by consumers. A study conducted by the Commission (2020) *"highlighted that 53.3% of examined environmental claims in the EU were found to be vague, misleading or unfounded and 40% were unsubstantiated."* The claims will need to be independently verified and proven with scientific evidence. See more here: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1692.

[25] See paragraph 37 of the draft Guidelines Article 210a CMO. The example under this paragraph notes that *"the agreement could include specific implementation measures, such as obligations to implement precision farming practices and pest monitoring, to use certain machinery or equipment, to implement risk management tools, or to support the dissemination of technical knowledge (including training, advice, cooperation and knowledge exchange), digital technologies or practices for sustainable management of nutrients."* See also paragraph 47 of the draft Guidelines.

[26] See paragraphs 81, 83 of the draft Guidelines Article 210a CMO.

the case in Article 101(3) TFEU, cannot justify a different interpretation of the indispensability test. It is difficult to understand why the co-legislators would have expressly used the same term as in Article 101(3), only for this to mean something different.

The indispensability test is designed to prevent inappropriate and avoidable restrictions of competition that inevitably lead to consumer harm. A contrary interpretation would effectively amount to legalising cartels between producers and other operators in the agri-food supply chain without providing the incentive driven by competition to innovate and aspire to higher sustainability goals. Sustainability standards agreements cannot, for example, serve as a covert way for producers to substantially increase prices solely on the grounds that their agricultural products are marginally more sustainable.[27]

While it is true that the EU co-legislators adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU, the requirement stipulated in Article 12 of TFEU to take into account consumer protection in defining and implementing other Union policies and activities cannot be neglected.[28]

4.2. Two steps introduced in the Guidelines

By analogy to the test under Article 101(3) TFEU, the draft Guidelines introduce two steps in the indispensability test under Article 210a. The first step assesses whether a sustainability agreement is reasonably necessary to attain the sustainability standard pursued, clarifying that the attainment of the sustainability standard should be "specific" to the agreement in question – *assessment of the indispensability of the sustainability agreement*.[29]

After the parties verify that the sustainability standard cannot be attained by acting individually, parties will need, in a second step, to consider whether the different provisions of the agreement (e.g. relating to price, output, innovation) restrict competition and, if so, are indispensable to attaining the sustainability standard – *assessment of the indispensability of the restrictions of competition*.[30]

4.2.1. Step 1 - The indispensability of the sustainability agreement

In terms of whether the sustainability standard can equally be attained by acting individually, the Guidelines list examples where cooperation/joint action might be deemed necessary. In stating that restrictive agreements will be indispensable where *"the more people that produce in a sustainable way and use the corresponding logo, the more likely it is that retailers and consumers will perceive that logo as trustworthy, which in turn enhances the potential economic return to producers who sell products carrying the logo"*[31], the draft Guidelines ignore the risk of greenwashing. Any restrictions of competition that do not lead to genuine sustainability improvements but rather to greenwashing cannot be considered indispensable.[32]

This is not a theoretical risk. The agricultural label "Haute Valeur Environnementale" (HVE) in France exemplifies this issue. As identified by our French member, UFC - Que Choisir,

[27] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 9.
[28] See also Case T 791/19, Sped-Pro S.A. v European Commission that highlights the foundational nature of the values set out in Article 2 TEU. The case illustrates the extent to which such, more abstract values in primary law, become justiciable and that their effect must be considered across other fields of EU law, see in particular paras. 75, 83, 84, 85, 88.
[29] See paragraph 84 of the draft Guidelines 210a CMO.
[30] See paragraph 101 et seq. of the draft Guidelines 210a CMO.
[31] See paragraph 93 of the draft Guidelines 210a CMO.
[32] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 9.

this label misleads consumers by creating a false appearance of offering environmental excellence and being trustworthy, while in reality the environmental performance required to use the label is no more demanding than the average French agricultural practices.[33]

Recent consumer protection law cases on misleading advertising in the Netherlands also confirm the risk of greenwashing. Following investigation by the Dutch Authority for Consumers and Markets, H&M and Decathlon committed, among other things, to improve their ways of communicating sustainability claims so that they are substantiated, clearer and more complete.[34]

A type of green claim which has become common on grocery shelves in recent years is one that relates to the climate impact of foodstuffs, suggesting that products are 'carbon neutral', 'CO2 neutral' or 'climate-neutral'.[35] However, this practice is scientifically inaccurate as the production of all food and drink will always necessitate the emission of carbon (or other greenhouse gases). Only on the global level, the concept of carbon neutrality can make sense. Hence, these claims unfairly confuse and mislead consumers when purchasing food and drink products in the supermarket, even those consumers that are more conscious of the climate crisis and the impact of their consumption.[36] BEUC's members have identified a number of climate neutral misleading claims in relation to products such as milk, cheese and meat.[37]

Not only is the consideration of the effects of businesses using misleading or greenwashing claims important in relation to consumers who must be able to make sustainable choices with confidence, but also in relation to protecting businesses that embark on genuine sustainability efforts as against those who compete unfairly by using misleading claims.[38] The draft Guidelines should thus provide more consideration of the risk of sustainability standards agreements excluding competition from products with higher sustainability standards than those foreseen by the agreements, that would deter those actors that genuinely want to achieve greater sustainability improvements, leading to negative consequences for the green transition, the environment and society as a whole.

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[33] See https://www.quechoisir.org/action-ufc-que-choisir-label-hve-il-trompe-le-consommateur-la-justice-doit-le-condamner-n105322/.

[34] Case ACM/22/179209, Commitment decision for H&M regarding sustainability claims of 19 August 2022; Case ACM/21/053823, Commitment decision for Decathlon regarding sustainability claims of 19 August 2022.

[35] BEUC's report on Climate Neutral Claims on Food Products (March 2023), p. 4, explains that *"the use of carbon offsetting, which underpins (partially or even the totality of) most such claims, is a controversial practice which provides no guarantees for 'locking in' carbon for the future. It allows companies to give the impression of taking serious immediate action on their climate impact whilst in reality delaying it for many years by opting to "compensate" it, which is easier and cheaper than cutting emissions from their current activities."*

[36] BEUC's report on Climate Neutral Claims on Food Products (March 2023), p. 6, 8. The report highlights the issue of having significant informational asymmetries between companies using 'carbon neutral' claims and consumers who are exposed to them. It is impossible for consumers to verify whether the amount of emissions that a company has declared and for which it has compensated actually corresponds to the amount of emissions generated in production, as well as to determine whether the projects that have been financed through compensation actually prevent greenhouse gases as effectively as they promise. "*Both points are not subject to any public or official control, but are solely the responsibility of the manufacturer and supplier of a product or service as well as the provider of the label*."

[37] BEUC's report on Climate Neutral Claims on Food Products (March 2023), p. 9-14. Our Spanish member, OCU, found an example of a milk bearing a 'carbon neutral' claim which ultimately turned out to be referring only to the packaging of the product and not the actual milk itself. See also about the dairy cooperative's Milcobel 'CO2 neutral' cheese in Belgium: https://co2.bruggefromage.be/plus-de-saveurs-sans-co2. The Danish consumer organisation, Forbrugerrådet Tænk, joined the Danish Vegetarian Association in a lawsuit against the big meat company Danish Crown over its 'climate-controlled pig' campaign: https://borsen.dk/nyheder/baeredygtig/forbrugerraadet-taenk-gaar-ind-i-historisk-retsopgor. See also results of a research on the effects of carbon neutral claims conducted by the German consumer organisation vzbv. The survey suggests that these claims are particularly powerful as they have the strongest positive impact on consumer perception of the (supposed) climate friendliness of a food product as well because they are capable to confuse even those consumers that previously held correct views about the products' climate impact: https://www.vzbv.de/sites/default/files/2023-02/23-02_24_Gruene-Marketingclaims-auf-Lebensmitteln.pdf.

[38] See: https://www.acm.nl/en/publications/acm-consumers-find-claims-regarding-carbon-offset-unclear. In line with also the intentions of the Commission's proposal for a Directive on green claims of 22 March 2023.

Another aspect that the draft Guidelines seem to ignore is that sustainability has become a "selling point" and a competitive parameter of its own, to which market operators in the agri-food supply chain have recourse in order to distinguish themselves from their less sustainable competitors. For example, the dairy co-operative Arla Foods, decided unilaterally to offer sustainability payments to its milk farmers to incentivize them to become more sustainable, and Aldi, the food retailer, unilaterally committed to convert its meat and milk product portfolio into the most animal welfare-friendly categories by 2030.[39]

These examples show that agreements restricting competition are not always necessary to achieve more sustainable agri-food supply chains. It is therefore essential that the Guidelines reflect this in relation to the indispensability analysis under Article 210a. Initiatives that aim for an industry-wide cooperation may not only not be indispensable but sometimes even be counterproductive to sustainability improvements.

4.2.2. Step 2 - The indispensability of the restrictions of competition

The draft Guidelines explain that if entering into a sustainability agreement is reasonably necessary to attain the sustainability standard in question, one must then determine whether each restriction of competition imposed by the agreement is indispensable to the attainment of the sustainability standard.[40]

While the Commission provides examples of restrictions that could be deemed indispensable (or not), it is unfortunate that the scenario envisaged in paragraph 112 to allow price-fixing goes beyond the degree of restrictions of competition that were considered indispensable in the real world.[41] For example, existing initiatives that concern an entire production process, e.g. Initiative Tierwohl and QM Milk in Germany[42] do not involve the kind of price-fixing that the draft Guidelines seem to have in mind as a possibility where "reasonably necessary". The Guidelines must take a more cautious approach to indispensability and not push the boundaries of the Article 210a derogation to allow the elimination of price competition or in other ways that will harm consumers.

The draft Guidelines do not consider that analysing the market coverage of a restriction of competition is necessary to determine whether a restriction is indispensable. They limit the significance of market coverage of sustainability agreements to *ex post* intervention.[43] The decision not to take market coverage into consideration under the indispensability test lacks substantive justification. In order to offset first-mover disadvantage for example, it might be sufficient for an agreement to cover 50% of the market. But then 100% market coverage is not indispensable. The draft Guidelines' interpretation of the indispensability test under Article 210a in effect limits itself to some form of cost control and takes any other valid considerations out of the assessment, such as the elimination of more eco-ambitious initiatives.[44]

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[39] See: https://www.foodbev.com/news/arla-introduces-e500m-sustainability-reward-scheme-for-farmers/ and https://www.aldi-sued.de/de/nachhaltigkeit/tierwohl/haltungswechsel.html?utm_source=google&utm_medium=paid_search&utm_content=text_aldi%20sued_public_na_v3_4107030211&utm_campaign=uf_nc_always%20on_22_phd_na.

[40] See paragraph 107 of the draft Guidelines Article 210a CMO.

[41] See paragraph 112 of the draft Guidelines Article 210a CMO.

[42] Bundeskartellamt, Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme, March 2022, see: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/29_03_2022_Milch_Nachhaltigkeit.html. See also the Initiative Tierwohl case summary, Compensation model of Initiative Tierwohl (ITW) to be developed and introduced for beef, March 2022, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-72-14.pdf?__blob=publicationFile&v=2.

[43] See paragraphs 119, 178, 179 of the draft Guidelines Article 210a CMO.

[44] See paragraph 118 of the draft Guidelines Article 210a CMO. See also paragraph 174.

5. Temporal scope of Article 210a

With regard to section 6 of the draft Guidelines, the temporal scope of Article 210a, we limit our comments to the subsection concerning force majeure clauses.

5.1. Force majeure

The draft Guidelines include the possibility for parties of a sustainability agreement in agriculture to continue benefiting from the Article 210a derogation if some terms of the agreement that are instrumental for the applicability of Article 210a are temporarily no longer met due to force majeure. While we realize the need for flexible and quick responses during crises, by different policies including competition policy, a certain level of caution should be observed so as not to create avoidable loopholes, or opportunities for abuse of the Article 210a derogation. Difficulties might also arise in terms of what the benchmark to classify something as force majeure should be, where many previously unforeseeable and extraordinary events are now part of normality (e.g. floods). Ultimately, force majeure cannot serve as an extra layer of derogation or justification for avoiding competition law rules.

6. Ex post intervention by the Commission and national competition authorities under Article 210a(7)

Article 210a(7) provides that national competition authorities and, in the case of agreements covering more than one Member State, the Commission, can intervene to require agreements to be modified, discontinued or not take place at all in order to prevent competition from being excluded or if they would jeopardise the objectives set out in Article 39 TFEU. The draft Guidelines however seem to promote a non-interventionist approach throughout this section.[45]

6.1. CAP objectives being jeopardised

With regard to the objectives set out in Article 39 of the TFEU, BEUC limits its comments to the objective that aims to ensure that supplies reach consumers at reasonable prices.

When noting that the *"reasonable prices' objective should not be understood as referring to the lowest price possible"*[46], the draft Guidelines do not consider a reverse scenario of an unreasonable price.[47] The appropriate benchmark for assessing whether prices are reasonable/unreasonable, fair/unfair or just/unjust is not always self-evident.[48] A benchmark would play an important role in preventing excessive prices. While prices should reflect and incorporate externalities, they should not lead to overcompensation of private operators.

[45] See for example paragraph 167 of the draft Guidelines Article 210a CMO. Nevertheless, one should bear in mind the important role antitrust has to play in the green transition. As noted by EVP Vestager in her keynote speech at the Global Competition Law Conference: Competition policy for greater resilience and effective transition, of 20 April 2023: *"Our enforcement work is also a tool in this respect. After all, the only way we can achieve our goals without hurting economic growth is through well-functioning, competitive markets."*

[46] See paragraph 168 of the draft Guidelines Article 210a CMO.

[47] OECD Policy Roundtables, Excessive Prices (2011), DAF/COMP(2011)18, page 26, footnote 13: *"Any theory of what constitutes a "just" price requires a set of assessment criteria that allow the distinction between "just" and "unjust" prices".*

[48] OECD Policy Roundtables, Excessive Prices, DAF/COMP(2011)18, p. 26. Also, while the ECJ in United Brands stated that *"charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse",* it provided no further details on how to determine this "economic value" of the product/service provided.

The draft Guidelines seem not to recognise the importance of "affordable food" as a basic necessity for consumers. This is in particular important in the case of the least affluent, where it is imperative that agreements between private market operators are not permitted to exclude different parameters of competition, in particular price competition. A certain degree of protection for price-sensitive consumers must be maintained. Furthermore, to attain a just transition, the guiding principle should be that the most sustainable option must be the easiest option for consumers while remaining affordable.

Considering both Article 12 TFEU, which requires consumer protection to be taken into account in defining and implementing other Union policies and activities, and Article 39(1)(e), which includes as an objective of the common agricultural policy "to ensure that supplies reach consumers at reasonable prices", the interpretation put forward in the draft Guidelines cannot be considered as compatible with the Treaty.[49] The Guidelines should be revised to include what would be considered unreasonable, unjust, unfair or excessive.

6.2. Exclusion of competition

If producers and operators can exclude competition and leave consumers with only one choice, the only option for consumers will be a potentially overpriced food product or not buying the product at all.[50]

In the event that agreements *de jure* or *de facto* exclude competition, relevant competition authorities should immediately intervene to prevent prolonged harm to agricultural markets and consumers.[51] However, if such a scenario arises and an *ex post* intervention follows, it is not clear that this would be sufficient to prevent serious consumer harm. A stricter approach at the outset to the interpretation of Article 210a under the indispensability test would thus be called for. Ultimately, the fact that the enforcer could intervene *ex post "does not therefore call in question the fact that [derogations] must be strictly interpreted"*.[52] This is particularly so where *ex post* intervention under Article 210a(7) involves no possibility of imposing a sanction for non-compliance with Article 210a,[53] unlike non-compliance with the indispensability test.[54]

7. Consistency with other EU guidance

7.1. Informal Guidance Notice

The draft Guidelines should mention the possibility of third parties' involvement when the Commission is determining whether to apply Article 210a(7) in a more explicit manner[55], thereby also ensuring consistency with the 2022 revised antitrust Notice on informal guidance, under which the Commisison may seek information from third parties when evaluating and giving guidance on an agreement.[56] The same should apply also to the opinion system under 210a(6).

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[49] Ibid, p. 10.
[50] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p. 9, 10.
[51] BEUC's comments on the Guidelines on the Antitrust Derogation in Article 210a CMO, ref: BEUC-X-2022-048 – 23/05/2022, p.10.
[52] Judgment of 7 March 2017, Marine Harvest v Commission, Case T-704/14, paragraph 201: *"[…]the mere fact that the Commission can impose severe penalties for infringement of a provision of competition law does not, therefore, call in question the fact that provisions derogating therefrom must be strictly interpreted."*
[53] See paragraphs 183 and 184 of the draft Guidelines Article 210a CMO.
[54] Where the agreement falls foul of Article 101(1).
[55] See paragraphs 181 and 186 of the draft Guidelines Article 210a CMO.
[56] European Commission, Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), see point 14: *"[…]other selected parties to provide supplementary information while safeguarding the confidentiality of the information provided by the applicant(s)."*

7.2. Horizontal Guidelines

The final text of the Guidelines should also ensure that it is consistent with the final Horizontal Guidelines on the applicability of Article 101, in particular in relation to the position on the exchange of commercially sensitive information. This should be deemed as not being indispensable to the achievement of sustainability standards also under the Article 210a Guidelines, neither at the stage of the development and adoption of the standard, nor at the stage of compliance and monitoring.[57] This is particularly important where the exchange of such information could lead directly or indirectly to price-fixing.

[57] For example, Bundeskartellamt reviewed an initiative on living wages in the banana sector, January 2022, see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html.

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